

is properly before the court. This is not a matter for appellant to arbitrarily so construe. Where a plaintiff has proved his right to an injunction against a nuisance or other injury, it is no part of the duty of the court to inquire in what way the defendant can best remove it. See *Attorney-General v. Colney Hatch Lunatic Asylum*.⁽³³⁾ "The court order" has never been discharged. There is no question of the undertaking suspending "the court order". An order even irregularly obtained cannot be treated as a nullity, but must be implicitly obeyed, until by proper application it is discharged. This view is supported by authority. In dealing with the contention that the original order had been erroneously granted in *Fennings v. Humphrey*⁽³⁴⁾ Lord Langdale M.R. said:—

"It is clear, that a party who is served with an order may be guilty of contempt for disobedience, in a case in which the order ought not to have been made. He is not to determine for himself, but ought to come to the court for relief, if advised that the order is invalid."

Nothing is more incumbent upon the courts than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against the courts.

As to the burden of proof the learned judge directed himself properly by satisfying himself beyond reasonable doubt that appellant had wilfully and intentionally aided and abetted Chai and his wife to disobey "the court order". The behaviour of appellant was contumacious. The learned judge has been careful in this case. It must be a difficult decision for him to make since a member of the legal profession was involved. As to sentence, I think the learned judge is right to impose a fine instead of a term of imprisonment.

For reasons given, I would dismiss the appeal with costs here and in the court below.

Suffian L.P. and Wan Suleiman F.J. concurred.

Appeal dismissed.

DES RAJ v. KIDAR NATH

[A.C.J. (Abdoolcader J.) March 12, 1975]

[Ipoh — Civil Appeal No. 45 of 1973]

Practice & Procedure — Set-off — Claim by appellant against respondent for \$12,125 in earlier proceedings — Discontinuance thereof — Court granting order barring appellant from filing any further proceedings in respect of claim of \$12,210 — Claim against appellant for \$4,500 — Whether appellant could set-off \$12,125 against claim in view of court order.

In an earlier suit, in High Court Civil Suit No. 744 of 1969, the appellant claimed against the respondent for the sum of \$12,210 being moneys due and payable by the respondent to the appellant. The defence and reply were filed and delivered but by an order dated December 17, 1970 and made on an application by the appellant for leave to discontinue, the appellant was granted leave to discontinue the action "upon the term that the plaintiff does not file any further proceedings of any kind in any way whatever relating to the present claim or the subject-matter thereof or otherwise howsoever."

In the present claim, the respondent's claim against the appellant is for the sum of \$4,500 paid by the respondent to

A the appellant's son at the appellant's request on or about 2nd April, 1969. The appellant admitted this claim but claimed in his defence to set-off against the moneys claimed a sum of \$12,125 being moneys paid to the respondent by the appellant from time to time to be held by the respondent on behalf of the appellant for the latter's use. The Sessions Court accepted the respondent's submission that the appellant was debarred from pleading set-off as a defence in view of the order dated December 17, 1970. The appellant appealed and contended that the learned President had failed to consider that a set-off had already occurred and that the sum of \$4,500 had already been appropriated towards the amount owed by the respondent to the appellant before the latter's claim became enforceable by virtue of the order of December 17, 1970. In this connection, the appellant referred to the defence in which the respondent had pleaded that out of the aggregate sum received by him from the appellant he had paid at the appellant's request a sum of \$4,500 to the appellant's son.

C Held, dismissing the appeal: (1) it is settled law that the sum set-off must have accrued due at the commencement of the action and all proper defences may be set up in reply, for example, infancy or limitation;

(2) by virtue of the discontinuance of the High Court Civil Suit by the appellant, the subject matter of that suit and all matters pleaded in the pleadings therein were never adjudicated and no effective appropriation had accordingly D ever been made as all matters in issue remained at large;

(3) the very wide terms of the order of December 17, 1970 would also preclude any consideration of any set-off.

[Editorial Note: In this case the appellant appealed to the Federal Court (F.C. Civil Appeal No. 13 of 1975) and the appeal was dismissed on September 10, 1975 (Gill C.J. (Malaya), Ali and Wan Suleiman F.J.J.). There was no written judgment].

E Case referred to:—

(1) *Smith v. Betty* [1903] 2 K.B. 317.

CIVIL APPEAL.

J.S. Sandu for the appellant.

L. Harcharan Singh for the respondent.

F Abdoolcader J.: The respondent sued the appellant in the Sessions Court at Teluk Anson for the sum of \$4,500 paid by him to the appellant's son at the request of the appellant on or about April 2, 1969. The appellant admitted this claim but pleaded in his defence to set-off against the moneys claimed a sum of \$12,125 being moneys paid to the respondent by G the appellant from time to time to be held by the respondent on behalf of the appellant for the appellant's use.

The respondent at the hearing before the Sessions Court contended that the appellant was debarred from pleading set-off as a defence to the respondent's claim as the amount alleged to be owing to the appellant by the respondent was unenforceable, and relied for this purpose on an Order dated December 17, 1970, in Ipoh High Court Civil Suit No. 744 of 1969. This Order was the result of the institution of proceedings by the appellant against the respondent in Penang Civil Suit No. 398 of 1969 (which was subsequently transferred to Ipoh as Ipoh High Court Civil Suit No. H 744 of 1969) for the sum of \$12,210 being moneys due and payable by the respondent to the appellant as set out in the particulars thereto. The defence and reply were filed and delivered but by an Order made on December 17, 1970, on an application by the appellant as plaintiff for leave to discontinue that action, he was granted leave to discontinue the action "upon the term that the plaintiff does not file any further

proceedings of any kind in any way whatever relating to the present claim or the subject matter thereof or otherwise howsoever."

I might add however as a matter of interest that it transpired from the evidence, both oral and documentary, adduced in the present proceedings that subsequent to and notwithstanding this High Court Order of December 17, 1970, the appellant made 6 claims for 6 different sums against the respondent which were in fact the subject matter of Ipoh High Court Civil Suit No. 744 of 1969, and in respect of 3 of these claims commenced actions in the Magistrate's Court at Teluk Anson and Nibong Tebal which were however dismissed with costs.

Judgment was entered for the respondent in the present proceedings by the Sessions Court and the appellant appealed to this court against that decision.

At the outset of the hearing of the appeal, counsel for the appellant sought leave to amend the Memorandum or Appeal to add an additional third ground to the effect that the respondent's claim was illegal and unenforceable. Though this point was not pleaded or raised in the action, I allowed the amendment as it is always open to a court to take cognizance of illegality even though it has not been pleaded.

The first ground of appeal was that the respondent should have pleaded in a reply to the defence that the appellant was debarred from pleading set-off as a defence to the respondent's claim on the ground that the sum allegedly owed to the appellant by the respondent was unenforceable, and that the appellant as a result of this failure to plead this by way of a reply was taken by surprise. This point was never taken in the Sessions Court by counsel who appeared for the appellant, and indeed counsel appeared to have shown no surprise at all when the point was raised on behalf of the respondent.

In any event, unlike the procedure for delivery of pleadings in the High Court, it is not open to a plaintiff as of right to file a reply in a subordinate court and he can only do so with leave of the court for sufficient reason under the provisions of Order X rule 10 of the Subordinate Courts Rules, 1950. In my view the matters raised by the pleadings were at issue at the close of the filing and delivery of the defence, and the fact that no reply was filed in these proceedings did not preclude the point taken being raised at the hearing. It was therefore open to the respondent to reply on the High Court Order of December 17, 1970, in answer to appellant's plea of set-off.

Adverting to the ground that the respondent's claim was illegal, the appellant's case on this point was based on the respondent's defence in Ipoh High Court Civil Suit No. 744 of 1969 in which the respondent as defendant in those proceedings pleaded that the moneys he received for and on behalf of the appellant (the plaintiff in that suit) were in respect of kuttus, and that the transactions between the respondent and the appellant were illegal and contrary to law. However, counsel for the appellant was not able to give any answer or explanation, cogent or other-

wise, when I pointed out that the appellant in his reply in those proceedings had categorically denied that he had ever had any transaction with the respondent which was contrary to law or illegal, and had gone on further to plead that the moneys deposited by him were not referable to the kuttus as alleged or at all. The several pleas in the defence and reply in the proceedings in Ipoh High Court Civil Suit No. 744 of 1969 were never adjudicated upon between the parties in view of the discontinuance by the appellant effected on the far-reaching term embodied in the Order of December 17, 1970.

In view of his categorical denial in those proceedings and the fact that those proceedings were never heard and determined, the appellant could not be allowed to approbate and reprobate as he pleased, and I could therefore see no merit or substance at all in this ground of appeal. The appellant had in the present proceedings all the relevant documents and yet did not plead illegality in the Sessions Court. Throughout the trial not a word was mentioned or any question asked of the respondent in this connection and at the close of the case for the respondent the appellant elected not to give evidence. I did not think therefore much could be said in the circumstances for the *fides* of the appellant in purporting to raise this point for the first time at this stage.

The last ground of appeal raised on behalf of the appellant was that the learned President had failed to consider that a set-off had already occurred and that the sum of \$4,500 had already been appropriated towards the amount owed by the respondent to the appellant before the appellant's claim became unenforceable by virtue of the Order of December 17, 1970, made in Ipoh High Court Civil Suit No. 744 of 1969. Counsel for the appellant referred in this connection to the defence put in by the respondent in the Ipoh High Court suit where in paragraph 3(j)(iv) he stated that out of the aggregate sum received by him from the appellant he had paid at the request of the appellant on April 2, 1969, a sum of \$4,500 to the appellant's son.

The appellant apparently appreciated that the learned President was correct in rejecting the defence of set-off as it is settled law that the sum set-off must have accrued due at the commencement of the action and all proper defences may be set up in reply, for example, infancy or limitation. There would therefore have to be an actionable debt due to the appellant at the time of the filing of this action (*Smith v. Betty*⁽¹⁾), but there was not, in view of the very wide prohibition imposed by the High Court Order of December 17, 1970, precluding the appellant from filing any further proceedings of any kind in any way whatever relating to the claim in the High Court Civil Suit or the subject matter thereof or otherwise howsoever.

Counsel for the appellant however submitted that although *Smith v. Betty*, *supra*, decided that a set-off must be in respect of an actionable debt, it was also contended that the solicitor in that case was entitled to appropriate and must be taken to have appropriated the sum in question to the balance moneys due to him, but held on the facts of that case that there had

been no such appropriation, and counsel sought to distinguish that case from the matter before me on the basis that in this case there had in fact been an appropriation before the High Court Order of December 17, 1970, was made by virtue of the matters alleged by the respondent in paragraph 3(j)(iv) of his defence in the Ipoh High Court Civil Suit No. 744 of 1969 which I have already adverted to, and that in the light of this it was open to the appellant to plead a set-off. The short answer to this is, in my view, the fact that by virtue of the discontinuance of the High Court Civil Suit by the appellant the subject matter of that suit and all matters pleaded in the pleadings therein were never adjudicated or determined and no effective appropriation had accordingly ever been made as all matters in issue in the pleadings therein remained as a result at large, and furthermore the very wide terms of the Order of December 17, 1970, would also preclude any consideration of any set-off or such purported appropriation.

In the circumstances I dismissed the appeal with costs.

Appeal dismissed.

Solicitors: Sandu & Co.; L.H. Singh & Co.

CHOP ENG THYE CO. v. MALAYSIA NATIONAL INSURANCE SDN. BHD.

[O.C.J. (Ajaib Singh J.) September 9, 1976]

[Muar — Civil Suit No. 48 of 1972]

Insurance — Fire Insurance — Claim on a cover note for sum insured against loss by fire — Condition of cover note — Non-compliance with — Whether payment could be recovered.

In March 1971, the plaintiffs applied to the defendants for a fire insurance cover in the sum of \$20,000 for their smoke house and its contents for a period of one year commencing April 2, 1971. Pursuant to this application and in consideration of the payment of a premium amounting to \$1,000.50 the defendants issued a protection note in favour of the plaintiffs. On April 6, 1971, the smoke house and all the goods therein were destroyed by fire. On April 10, 1971, the plaintiffs gave notice of the fire and loss to the defendants but the latter had failed to settle the sum of \$20,000 or any portion thereof under the protection note. Instead, the defendants relied on, *inter alia*, a condition of the said note which stipulated that the defendants should not be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim was the subject of pending action or arbitration.

Held, dismissing the plaintiffs' claim: there was no pending action or arbitration within twelve months of the happening of the loss or damage so that when the plaintiffs filed their action against the defendants, the defendants had ceased to be liable to the plaintiffs for any loss or damage.

Cases referred to:-

- (1) *Ramrati Kuer v. Dwarika Prasad Singh & Ors.* A.I.R. 1967 S.C. 1134.
- (2) *Queen Insurance Company v. William Parsons* (1881-82) 7 App Cas. 96.
- (3) *General Accident, Fire and Life Assurance Corporation Ltd. v. Shuttleworth & Anor.* (1938) 60 Ll. L.R. 301.

CIVIL SUIT.

N. Jagatheeson for the plaintiffs.

Y.M. Raja Abdul Aziz Addruse for the defendants.

A **Ajaib Singh J.:** The plaintiffs claimed a sum of \$20,000 from the defendants on a cover note issued by the defendants for that sum against loss or damage by fire to the plaintiffs' smoke house and its contents. The action was commenced by a writ of summons dated May 16, 1972. In their statement of claim the plaintiffs averred that some time in March 1971 they applied to the defendants for a fire insurance cover in the sum of \$20,000 for their smoke house and its contents for a period of one year commencing April 2, 1971. Pursuant to this application and in consideration of the payment of a premium amounting to \$1,000.50 the defendants issued a protection note in favour of the plaintiffs. The plaintiffs further averred that on April 6, 1971 the smoke house and all the goods therein were destroyed by fire. Due notice of the fire and loss arising therefrom was given to the defendants on April 10, 1971 but the defendants had failed to settle the sum of \$20,000 or any portion thereof under the said protection note.

The defendants denied the making or issuing of the protection note and averred that the note was issued without their authority or consent by some person not being a person duly appointed as their agent. They further averred that as soon as they became aware of the protection note they rejected the risk and informed the plaintiffs accordingly on April 15, 1971. The defendants also returned the cheque for \$1,000.50 which was deposited by the plaintiffs with the person who issued the protection note. Alternatively the defendants averred that if the issue of the protection note was valid the plaintiffs had failed to observe a condition of the note which stipulated that on the happening of any loss or damage by fire to the property insured the plaintiffs should forthwith give notice thereof to the defendants and should within 15 days after the loss or damage deliver to the defendants a claim in writing for the loss and damage giving particulars of the articles or items damaged or destroyed in the fire and particulars of all other insurances if any covering the same property. In the further alternative the defendants averred that another condition of the note stipulated that the defendants should not be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim was the subject of pending action or arbitration. The plaintiffs having made no reference to arbitration in respect of their claim within the aforesaid period of twelve months and having commenced their action after the expiration of that period the defendants were not liable. Lastly the defendants denied that the plaintiffs had suffered any loss or damage and put the plaintiffs to strict proof thereof.

In their reply to the defence the plaintiffs pleaded estoppel and averred that if the protection note was issued without the authority or consent of the defendants by a person not being their agent the defendants were estopped from denying that the person had authority or consent to issue the protection note. Particulars of estoppel were set out in the reply which stated that by giving the protection note and the proposal form of the defendants to the person who had issued the protection note the defendants thereby represented to the plaintiffs that the person had the authority to fill up and issue the protection note.